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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No 49

EDWARD MISHKIN,

Appellant,

—against—

THE STATE OF NEW YORK,

Appellee.

BRIEF OF THE CITIES OF NEW YORK, CHICAGO, LOS ANGELES, DENVER AND ST. PAUL, *AMICI CURIAE*

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Statement

This brief *amici curiae* is submitted under the authority of Rule 42, Subd. 4 of the Rules of this Court, permitting a political subdivision of a state, without the consent of the parties to a case, to file a brief *amicus curiae* sponsored by the authorized law officer of the municipality.

Interest of the *Amici*

1.

Municipal officials and the chief legal officers of the nation's municipalities are directly concerned with the problems created by the circulation of obscene publications.

Laws prohibiting the dissemination of obscene matter are universal among our states. This legislation reflects the conviction of the overwhelming majority of our people that distribution of obscene publications is socially harmful and tends to degrade and debase our society.

For city and other local officials, the traffic in obscene materials is a troublesome and recurring municipal problem. Because of the legal complexities involved in efforts to cope with this problem, local administrations necessarily turn to their municipal attorneys for advice as to lawful and effective remedial measures.

Some municipal law officers have a direct statutory duty and responsibility to combat the dissemination of obscene publications. For example, under §22-a of the New York State Code of Criminal Procedure, the chief law officer of any city, town or village in that state has power to maintain civil proceedings to restrain the sale or distribution of obscene matter. The constitutionality of this statute was sustained by this Court in *Kingsley Books, Inc.* v. *Brown,* 354 U. S. 436 (1957).

Prevention of the distribution of obscene matter, considered as a law enforcement task, is in most jurisdictions primarily a responsibility of the municipal police. They often consult with the municipal attorney for advice on legal questions encountered in this field.

Moreover, when it comes to the attention of citizens of a municipality, or of its civic, religious or community leaders, that matter considered by them to be obscene is being circulated in their area, they commonly communicate in the first instance with the mayor or other municipal executive. In such situations, the local administration frequently consults with the municipal attorney for counsel as to appropriate action.

Municipal administrative officials and municipal law officers are thus directly concerned with efforts to prevent the dissemination of obscene materials and with enforcement action seeking to establish that particular publications or types of matter fall within the lawful prohibitions of anti-obscenity statutes. Where public opinion in a municipality evidences a judgment that matter being distributed there transgresses the bounds of decency, and the municipal attorney believes that no infringement of constitutional safeguards is at issue, it is fitting and appropriate for the municipal officers, as servants of the community involved, to support court proceedings brought to vindicate the public verdict of condemnation.

Finally, when it is known to the officials and municipal attorney of a community that public opinion in the locality indorses the endeavors of other communities, through legal proceedings, to curb the dissemination of obscene matter, it is similarly appropriate that these officers support the position of the other communities in such proceedings.

2.

Large and broadly representative groups in our municipal populations are evidencing a strong and growing concern over the tide of obscene and indecent publications which envelops their areas.

The report submitted to Mayor Robert F. Wagner of New York City in April, 1965, by the Mayor's Citizens Anti-Pornography Commission, a group of New York City residents representing a cross-section of the entire community, expresses this concern in compelling terms, and voices the widely held conviction that the public welfare requires strong and effective action to stem this tide of salacious and degrading matter.

One of the principal reasons for the establishment of the Commission was to provide a body of citizens constituted so as to be capable of accurately reflecting and expressing the community's standards of decency regarding treatment of sexual themes in published material.

The Commission examined a number of books and magazines in circulation which were complained of as obscene by outraged citizens and community groups. Before the Commission undertook its study, it was carefully informed by the New York City Corporation Counsel of the tests of obscenity established by the decisions of this Court and the New York Court of Appeals.

Among the Commission's conclusions were unanimous findings that various books which it examined, including a number indistinguishable from books of the "Queen Bee" type involved in this case, grossly violate contemporary community standards of decency.

In its report, the Commission commented on recent decisions of the courts holding that books such as "Tropic of Cancer" and "Memoirs of a Woman of Pleasure", and certain other publications, do not violate obscenity statutes. The Commission expressed the view that, in so far as these rulings declare that such books and publications do not overstep contemporary community standards of decency, the courts have misapprehended such community standards and have erroneously attributed to the public a lax view of propriety in published descriptions or representations of sexual matters.

Many communities throughout the country have shown strong interest in the work of the Commission. Moreover, there have been widespread indorsements of the Commissions recommendations of active citizens' programs for the purpose of clearly demonstrating the quality and character of community standards of decency.

ARGUMENT

The Nature of the Books Involved

The books at issue are plainly devoid of any semblance of literary, artistic or scientific merit or value. There can be no pretense that they advocate ideas.

This case is somewhat unique in that the purpose of the authors and artists who wrote and illustrated most of the subject books may be gathered from their express testimony in the record. The authors were in effect directed by appellant to write with the prime object of exciting erotic desires. Appellant's instructions, in summary, were to load the books with detailed and lurid portrayals or symbols of perverted, abnormal and licentious sex (Hackshaw, 1227-35, 1242; Johnson, 1297-8, 1307, 1337-8; Rosen, 1187).

It is clear that these books do not seek to convey anything of literary, artistic or conceptual significance, but are rather designed for the sole purpose of functioning as a aphrodisiac.

The Books are Clearly Obscene under the Test of Obscenity Established by the Decisions of this Court

The books fall squarely within the test of obscenity laid down in *Roth* v. *United States,* 254 U. S. 476, 489 (1957) and reiterated and further explained in *Manual Enterprises* v. *Day,* 370 U. S. 478, 482-486 (1962) and in *Jacobellis* v. *Ohio,* 378 U. S. 184, 191-195 (1964).

A. The test of obscenity

In *Roth* this Court stated the basic element of the test to be (354 U. S. at p. 489):

> "Whether to the average person, applying contemporary community standards, the dominant theme of

the material taken as a whole appeals to prurient interest."

In *Manual Enterprises,* it was stated that a further element of the test is that the challenged material must be "patently offensive," i.e. it must affront "current community standards of decency * * *" (370 U. S. at pp. 482, 486).

In *Jacobellis,* this Court reiterated and elaborated on the above standards, declaring that the *Roth* test "requires in the first instance a finding that the material 'goes substantially beyond customary limits of candor in description or representation of such [sexual] matters.' " (378 U. S. at p. 191 [interpolation supplied]). This Court further stated in *Jacobellis* that "material dealing with sex in a manner which advocates ideas * * *, or that has literary or scientific or artistic value or any other form of social importance may not be branded as obscenity * * *." (*ibid.*)

B. Predominant appeal to "prurient interest"

1. Definition of "prurient interest"

In *Roth,* this Court approved a definition of "prurient interest" which declares that this term means " 'a shameful or morbid interest in nudity, sex * * *'." (354 U.S. at p. 487)

2. The "bondage" books

(a)

The subject books of the so-called "bondage" type predominantly feature flagellation, torture or other physical abuse of persons who are verbally or pictorially represented as simultaneously experiencing pain and pleasure during

their ordeal. Sexual fetishism is also prominent in many of these books, in the form of displays of whips, ropes, belts and other articles conveying the imagery of this form of sexual perversion. The dominant theme of this type of book is the infliction of pain, portrayed in a manner designed to stir morbid sexual excitement among those who respond erotically to depictions of sadism and masochism.

(b)

It is clear from applicable principles of judicial notice that the courts may take judicial notice of the appeal of the "bondage" books to the "prurient interest" of those susceptible to this kind of sexual stimulation.

Under the authority of the courts to take judicial notice of well established scientific facts, they may judicially notice the diseases to which mankind is subject, including well known facts relating to emotional and mental disturbances. *Von Eye* v. *Hammes,* 147 F. Supp. 174, 182 (D. C., Minn., 3rd Div., 1956), aff'd 245 F. 2d 756 (Ct. App., 8th Circ., 1957); *Golaris* v. *Jewel Tea Co.,* 22 F.R.D. 16, 20 (D. C., N. D., Ill., 1958); 31A C.J.S. §79, pp. 81-85.

In taking judicial notice of scientific facts, the courts may refer to scientific treatises and studies and like sources of information. *Tolfree* v. *Wetzler,* 22 F. 2d 214, 224-225 (D. C., N. J., 1927), rev'd on other grounds, 25 F. 2d 553 (Circ. Ct. App., 3rd Cir., 1928), cert. den. 278 U. S. 628 (1928); Wigmore on Evidence (3rd ed.), Vol. IX, §2568a, p. 537; 31 C.J.S. §12, p. 833.

The form of sex abnormality characterized by erotic responses to sadism or masochism (or portrayals thereof) is a well known phenomenon in the behavorial sciences and is described in leading scientific treatises dealing with sexual disorders (e.g., "Sexual Behavior of the Human Fe-

male," Indiana University Institute for Sex Research, pp. 676-681; "Variations in Sexual Behavior" (1957), Dr. F. S. Caprio, pp. 206, 265, 271, 273).

The appellant in this case was tried and found guilty by three judges of the New York City Court of Special Sessions, who, after considering the nature and characteristics of the subject "bondage" books, determined them to be obscene (26 Misc. 2d 152, 155-157). The observations of these judges in their opinion show that they recognized the appeal of these books to sick and abnormal sex urges through portrayals of sadism and masochism (26 Misc. 2d at pp. 155-156). The trial court thus in effect took judicial notice of the capacity of the books to excite the sexual reactions of the deviant audience for which they are intended. As has been demonstrated, the trial court was amply warranted in judicially noticing this fact.

(c)

The morbidly sexual displays of sadism and masochism in the "bondage" books are not exculpated because the "average person", representative of the majority, normal elements of the population, may not find them sexually stimulating.

Gross forms of indecent materials could be freely circulated if the criterion of appeal to "prurient interest" could not be satisfied without a demonstration that the matter in question is capable of stirring a morbid or shameful interest in sex on the part of the entire population.

For example, under such a theory, the test of obscenity would not condemn a deliberately pornographic publication devoted solely to the most detailed, sordid and indecent descriptions of particular forms of abnormal sex acts which the heterosexual majority of the population would find disgusting, but not stimulating sexually.

At the same time, accounts of some forms of abnormal sex may be erotically stimulating to a substantial number of normal individuals.

The conclusion is impelled that a reasonable application of the "prurient interest" element of the test does not require the courts to conduct psychiatric, sociological and statistical surveys in an effort to ascertain how large a proportion of the population would be erotically stimulated if exposed to material having less than general sexual appeal.

Judicial precedent supports the view that in situations where matter is designed to stimulate the sex desires of particular classes of persons, and may not be sexually stimulating to the normal individual, the "average person" component of the "prurient interest" standard is satisfied if the material is capable of exciting the "prurient interest" of the average member of the audience at which the material is aimed.

In *Manual Enterprises,* the Court of Appeals ruled that the "prurient interest" element of the test is satisfied if the publication in question predominantly appeals to the "prurient interest" of the average person who is a part of its intended readership (289 Fed. 2d 455 [1961]). Magazines featuring photographs erotically stimulating to homosexuals only were held by the Court of Appeals to be within the "prurient interest" standard because the publications would arouse the sex desires of the average homosexual. While this Court set aside the determinations below that the magazines were obscene, none of the prevailing opinions expressed the view that the Court of Appeals had erred in applying the "prurient interest" criterion in the manner described above. Mr. Justice Harlan, writing with the concurrence of Mr. Justice Stewart, found that the magazines were not patently offensive and therefore not

obscene, and on this basis, did not reach the question as to whether the Court of Appeals had correctly interpreted the "average person" element of the test.

It is submitted that the Court of Appeals gave the phrase, "average person", a reasonable and permissible interpretation in holding that the term can be construed as meaning the average reader for whom the material is intended, in cases where abnormal sex is involved. Under this interpretation, the "bondage" books plainly fall within the test of obscenity.

As has been demonstrated, *supra,* it is a well known scientific fact, judicially known to the courts, that this material is sexually stimulating to the deviates for whom it is intended. It is obvious, therefore, that the dominant theme of these books is an appeal to the "prurient interest" of devotees of sex-centered sadism, masochism and fetishism. The books have no other theme or purpose.

The application of the test to these books must be approached with due recognition of the serious results of an interpretation requiring a general erotic appeal as the measure of pruriency. As is pointed out *supra,* such a requirement would immunize the most flagrant pornography, so long as its prurient appeal is addressed to a minority.

(d)

It will be noted that the "average person" element of the *Roth* test specifies that the material transgresses where *"to* the average person, applying contemporary community standards" (emphasis supplied) the dominant, overall theme is an appeal to "prurient interest". Thus, under circumstances such as those presented by the "bondage" books, the criterion can be the judgment or view of the average person as to the capacity of the material to pro-

duce a prurient effect on the limited class susceptible to it, and the test need not be confined to the sexual response (or lack of it) which the material is capable of producing in the average individual.

It follows that the test is satisfied in these situations if the average person can recognize that the material excites a morbid and shameful interest in sex on the part of the audience to which the material is addressed.

The test does not require proof of the actual effect of the material on any person. The controlling criterion is the capacity or potential of the material for appeal to "prurient interest". This is borne out by the observation of Mr. Justice Harlan and Mr. Justice Stewart, in their prevailing opinion in *Manual Enterprises,* that the Federal statute forbidding the mailing of obscene matter is to be interpreted, under the *Roth* test, as condemning "such material irrespective of the *effect* it may have on those into whose hands it falls * * *" (370 U. S. at pp. 483-484).

The average citizen is well aware of the various forms of sex deviation and perversion. They are mentioned and discussed in popular literature (e.g., "East of Eden", by John Steinbeck, describes masochistic practices in a bordello [pp. 236, 322]). Such abnormalities present social and penological problems which are constantly before the public and which therefore make these phenomena an integral part of public knowledge. The average person, therefore, is capable of recognizing matter which depicts these deviations or is calculated to inflame the desires of their practitioners.

Thus, when publications featuring such matter are being circulated, the average citizen is able to judge whether their dominant appeal, in the light of contemporary community standards, is to a shameful or morbid interest in sex on the part of the deviates or perverts for whom the material is intended.

The "bondage" books clearly fall within this construction of the "prurient interest" element of the test. It is recognizable to the average citizen that these books excite morbid and shameful sex impulses in perverted individuals who are stimulated by sexually permeated exhibitions of sadism, masochism and fetishism.

(e)

In several prior cases involving "bondage material" identical in nature with that here at issue, both the Federal courts and the courts of New York State have not hesitated to rule such material obscene.

In *Klaw* v. *Schaffer,* 151 F. Supp. 534 (D. C., N. Y., 1957), aff'd on opinion below, 251 F. 2d 615 (2nd Circ., 1958), a distributor of "bondage" material and other matter sued to enjoin enforcement of an order of the Post Office Department barring the "bondage" material and other items from the mails as obscene. Summary judgment was granted dismissing the suit.*

In *People* v. *Zucker,* 15 App. Div. 2d 883 (1st Dept., 1962), cert. den. 371 U. S. 863 (1962), the defendant was prosecuted for violation of the New York State statute forbidding dissemination of obscene matter (Penal Law, §1141) by reason of his having offered for sale certain matter, including "bondage" books similar to those here concerned. It was held that the books were obscene and that the defendant had been properly convicted for dealing in these "bondage" publications.

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* The plaintiff Klaw applied for certiorari in order to obtain review of the decision of the Court of Appeals, but this Court did not pass on the application on the merits. On the ground that Klaw had failed to make timely substitution of the proper postal officer for Schaffer, who had resigned, this Court vacated the judgment below and remanded the case to the District Court, with instructions to dismiss Klaw's complaint as abated (357 U. S. 346 [1958]).

In *United States* v. *Klaw* (unreported; opinion annexed to appellant's brief as Appendix B) heavily relied on by appellant, a jury found the defendants guilty of mailing obscene matter and certain related offenses, on the basis of defendants' distribution of "bondage" publications similar to those at issue. The Court of Appeals set aside the conviction on the ground that there was insufficient proof to enable a jury to determine that defendants' publications appealed to "prurient interest". The view of the Court of Appeals appears to be that "bondage" material may not be made the basis of an obscenity conviction by "judge or jury without any proof demonstrating that it has the proscribed effect on any of our citizenry" (appellant's brief, Appendix B, p. 56). But this theory that an actual prurient effect must be proved is directly contrary to the statement of Justices Harlan and Stewart in *Manual Enterprises* (*supra*, p. 11) that the *Roth* test does not require proof that any person was actually affected, but only that it be apparent that the material has the capacity to arouse "prurient interest".

The *Klaw* prosecution is clearly distinguishable from the case at bar, since the appellant Mishkin was tried by a court sitting without a jury. As has been pointed out *supra*, p. 8, the Court of Special Sessions, in its opinion in this case, expressly recognized that the publications which it condemned as obscene included "sadistic" and "masochistic" material (26 Misc. 2d at p. 156). Special Sessions, in applying the *Roth* test, thus took cognizance of the nature of the appeal of the "bondage" books to the "prurient interest" of the sexually abnormal persons who respond to this form of erotic stimulus. The authorities cited *supra*, pp. 7-8, demonstrate that the trial court was entitled to take judicial notice of these matters.

As a justification for its decision in the *Klaw* prosecution, the Court of Appeals cites rulings of the courts find-

ing various publications such as "Tropic of Cancer" and "Fanny Hill" not be obscene, suggesting that if such books are exonerated, it would be unfair to condemn "bondage" books (appellant's brief, Appendix B, pp. 54-55). This line of argument overlooks the fact that the exculpation of the publications cited by the Court of Appeals rests or may be interpreted as resting on a determination that they possess literary or artistic merit or attributes of social importance. There is no pretense that "bondage" books possess any such characteristics.

It is submitted that the Court of Appeals underestimated the knowledge and understanding of the average man, in concluding that without explanatory testimony or evidence, he is unable to discern the prurient appeal of "bondage" material.

3. The books other than of the "bondage" type

The other books are devoted to portrayals of sexual episodes and abnormal sex practices in terms which are, in general, calculated to arouse erotic excitement in the average, normal individual. These books include descriptions of heterosexual and homosexual seductions, as well as rape, sodomy and masturbation. The contents of these books are flagrant examples of the pornographer's craft and plainly come within the "prurient interest" standard.

In *People* v. *Finkelstein,* 11 N. Y. 2d 300, 305 (1962), one of these books, "Queen Bee", which is typical of a number of the others, was held to be obscene by the New York Court of Appeals under the *Roth* test. This Court denied certiorari *in the Finkelstein case* (371 U. S. 863 [1962]).

In *People* v. *Fried,* 18 App. Div. 2d 996 (1st Dept., 1963), the New York Court upheld an obscenity conviction based upon the sale of photographs and a book entitled "College

for Sinners." This book is similar in its offensive characteristics to those (other than of the "bondage" type) here under discussion. This Court denied certiorari in the *Fried* case (378 U. S. 578) simultaneously with the rendition of the *Jacobellis* decision.

C. Patent offensiveness

The subject books clearly evidence the second basic element of the test of obscenity, which, as explained in *Manual Enterprises,* prescribes that the material must be "patently offensive," that is, it must affront "current community standards of decency * * *" (370 U. S. at p. 482).

1.

The "bondage" books constitute a public flaunting of detailed, lurid descriptions and representations of revolting forms of sex perversion. It is submitted that it is self-evident that the mores of our communities do not tolerate the deliberate exhibition of such shocking and degrading spectacles of abnormal sex suffused with cruelty. It is equally clear that such material exceeds the customary limits of candor with respect to description of sexual matters. The insult to decency inflicted by such publications is aptly conveyed by language used by the New York Court of Appeals in *People* v. *Richmond County News,* 9 N. Y. 2d 578 (1961), where that Court described the indicia of obscenity as follows (p. 587):

> "Depicting dirt for dirt's sake, the obscene is the vile rather than the coarse, the blow to sense, not merely to sensibility. It smacks, at times, of fantasy and unreality, of sexual perversion and sickness and represents, according to one thoughtful scholar, 'a debauchery of the sexual faculty'."

2.

The subject books, not of the "bondage" type, represent the more common type of pornography, patently offensive in any American community. As is pointed out in *Manual Enterprises,* in most obscenity cases, the basic elements of appeal to "prurient interest" and "patent offensiveness" overlap and "tend to coalesce * * *" (370 U. S. at (p. 486). This Court there noted that it is "only in the unusual instance where, as here, the 'prurient interest' appeal of the material is found limited to a particular class of persons that occasion arises for a truly independent inquiry into the question whether or not the material is patently offensive." (*ibid.*)

CONCLUSION

The judgment below should be affirmed.

The books involved in this case proclaim on their face that they are, in the language of *Roth* and *Jacobellis*, "utterly without redeeming social importance" (354 U. S. at p. 484; 378 U. S. at p. 191). They represent nothing but deliberately contrived, grossly indecent devices for the stimulation of erotic excitement. They are manifestly, in the language of *Manual Enterprises*, the kind of "obnoxiously debasing portrayals of sex" (370 U. S. at p. 483) which obscenity statutes may proscribe, and, as an abuse of the right of free expression, they are not entitled to constitutional protection.

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